

1 THE HONORABLE JOHN C. COUGHENOUR  
2  
3  
4  
5  
6  
7  
8

9  
10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT SEATTLE

13 WINDSONG CONDOMINIUM  
14 ASSOCIATION, a Washington non-profit  
15 corporation,

16 Plaintiff,

17 v.

18 BANKERS STANDARD INSURANCE  
19 COMPANY, a foreign corporation; ACE FIRE  
20 UNDERWRITERS INSURANCE  
21 COMPANY, f/k/a CIGNA FIRE  
22 UNDERWRITERS INSURANCE  
23 COMPANY, a foreign corporation,

24 Defendant.

25 Case No.: C08-0162 JCC

26 ACE'S OPPOSITION TO MOTION FOR  
PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER  
DAMAGE"

ORAL ARGUMENT REQUESTED

NOTED ON MOTION CALENDAR:  
September 19, 2008

20 I. INTRODUCTION

21 In this motion, Plaintiff Windsong Condominium Association ("the Association")  
22 seeks the Court's ruling that the property insurance policies issued to it by Defendants cover  
23 the Association's water-caused deterioration and rot damage, even though that damage is  
24 plainly excluded by the insurance policies. Characterizing its property loss as "water damage,"  
25 the Association argues that the policies do not exclude "water damage" and therefore its loss  
26 must be covered. Washington courts have rejected similar attempts by policyholders to

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER DAMAGE" - 1  
C08-0162 JCC

LAW OFFICES OF  
COZEN O'CONNOR  
A PROFESSIONAL CORPORATION  
SUITE 5200  
WASHINGTON MUTUAL TOWER  
1201 THIRD AVENUE  
SEATTLE, WASHINGTON 98101-3071  
(206) 340-1000

1 rename their losses in an effort to create coverage in the face of policy exclusions. This Court  
2 should deny the Association's motion and rule that the Association's rot and deterioration  
3 damage, even if caused by water intrusion, is excluded and not covered by Defendants'  
4 policies.

5 The Association also seeks the Court’s ruling that if some “water damage” took place  
6 during ACE’s policy periods, then ACE must pay for all water damage that may have followed  
7 later. A ruling on this topic would be premature and unnecessary, as the Association has not  
8 established that any damage developed when the ACE policies were in effect. Furthermore,  
9 the rule on which the Association relies applies only to third-party liability policies, not first-  
10 party property policies such as ACE’s.

## II. FACTS

12 Defendants Bankers Standard Insurance Company and ACE Fire Underwriters  
13 Insurance Company (formerly CIGNA Fire Underwriters Insurance Company) (collectively  
14 "ACE") issued a series of four annual insurance policies to the Association, beginning May 18,  
15 1989. The final policy expired May 18, 1993. The policies included property insurance  
16 coverage, covering the Association's condominium building located at 12349 Roosevelt Way  
17 NE, Seattle, WA 98125.<sup>1</sup>

18 The Declarations page of the policy indicated the “Level of Protection” offered by the  
19 policy as “Comprehensive.”<sup>2</sup> Comprehensive protection covered “the risk of direct physical  
20 loss or damage by any cause of loss except those under Comprehensive Protection –  
21 Exclusions.”<sup>3</sup> The Comprehensive Protection form (Form FA-3R84 (1/87)) contains the  
22 following exclusions relevant to the Association’s loss:

## Comprehensive Protection – Exclusions

<sup>24</sup> <sup>25</sup> <sup>1</sup> A copy of the final 1992-93 policy is attached to the Declaration of Todd C. Hayes as Exhibit C, at pp. 47-131 of 139. It is undisputed that the three prior ACE policies contained language identical to that found in the 1992-93 policy.

<sup>2</sup> Hayes Decl., at 54 of 139.

<sup>3</sup> Hayes, Decl., at 88 of 139.

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER DAMAGE" - 2  
**C08-0162 JCC**

LAW OFFICES OF  
**COZEN O'CONNOR**  
A PROFESSIONAL CORPORATION  
SUITE 5200  
WASHINGTON MUTUAL TOWER  
1201 THIRD AVENUE  
SEATTLE, WASHINGTON 98101-3071  
(206) 340-1000

1  
2  
3  
4  
5  
If you have Comprehensive Protection, your protection does not  
include coverage for loss or damage caused by or resulting  
directly or indirectly from the following causes, or occurring in  
the following situations. Such loss or damage is excluded  
regardless of any other cause or event that contributes  
concurrently with or before, during or after a loss. But we will  
cover 'resulting fire or explosion' arising out of any of these  
excluded causes except 'war.'

6  
\* \* \*

7  
8  
9  
16. 'Wear and Tear' deterioration, rust, corrosion, marring or  
scratching, erosion, wet or dry rot, and mold. However, we will  
cover resulting loss or damage caused by: vehicles or aircraft,  
'sprinkler leakage,' water damage, freezing, collapse of a  
building or falling objects.

10  
\* \* \*

11  
12  
13  
14  
21. Faulty design, workmanship and material including the cost  
of correcting any faulty design, workmanship, material,  
manufacture or installation, alteration, repair or work on covered  
'real property' or 'personal property.' But we will cover loss or  
damage that results from any of these, if the loss or damage  
occurs in connection with any cause of loss not otherwise  
excluded in this policy.

15  
22. Settling, shrinking, cracking, bulging or expansion of any  
pavement, building or structure.

16  
Hayes Decl., at 88-89 of 139.

17  
After the Association discovered rot damage at certain areas of its building in 2005,  
18  
nearly 13 years after the expiration of ACE's last policy, it submitted an insurance claim to  
19  
ACE and the subsequent property insurer, State Farm Fire and Casualty Company.<sup>4</sup> State  
20  
Farm retained structural engineer James R. Perrault, who conducted a "destructive  
21  
investigation" of the building. Decl. of James R. Perrault, p. 2, ¶4. He directed that openings  
22  
be made in the exterior of the building to determine if damage existed. *Id.*; Deposition of  
23  
James R. Perrault, Aug. 28, 2008, p. 13.<sup>5</sup> Mr. Perrault observed damage as a result of water

24  
<sup>4</sup> Hayes Decl., at 132-139 of 139

25  
<sup>5</sup> The exterior walls of the Windsong building were constructed as follows: gypsum wallboard sheathing was  
nailed to the building's framing studs. One layer of building paper was placed over the gypsum sheathing.  
Traditional exterior stucco was placed over the building paper. Perrault Dep., at 17:18-18:4.

1 intrusion at several locations. The most severe damage was at the south wall, with "significant  
2 decay in framing" at the southeast and southwest corners. Decay at the other walls was minor  
3 or nonexistent. He also observed some areas of water damage to the gypsum sheathing.  
4 Perrault Decl., p. 2-3, ¶6; Perrault Dep., at 13:13-14:5.

5 Mr. Perrault completed his work for State Farm regarding the Windsong Condominium  
6 near the end of 2006 or beginning of 2007. Perrault Dep., at 52:14-16. In June 2008, after  
7 commencement of this lawsuit, counsel for the Association contacted Mr. Perrault concerning  
8 a declaration. The Association's counsel authored the declaration and sent it to Mr. Perrault  
9 for review. Mr. Perrault made no substantive changes and signed it on July 15, 2008. Perrault  
10 Dep., at 52:17-54:9. Therefore, the specific use of the words "water damage" in paragraphs 6  
11 and 7 of the Perrault Declaration, was entirely a choice made by the Association's lawyers, not  
12 Mr. Perrault. Whereas the words "water damage" could arguably be used to describe the  
13 conditions he found at the building, thus allowing him to sign the Declaration, Mr. Perrault  
14 explained in his deposition that "water damage," as used in his Declaration to describe  
15 conditions at Windsong, referred only to the wood rot and deterioration of gypsum sheathing  
16 that he observed, and nothing more:

17 Q [by Mr. Bennion] Now, in Paragraph 6, the declaration says  
18 that – it says that you determined that part of the condominium  
19 were suffering from water damage as a result of water leaking  
through the building envelope, and then you give examples.

20 'For example, gypsum sheathing and wood framing at the  
21 western portion of the south wall are damaged from water  
leaking through the condominium envelope.'

22 Again, what did – was this water damage that this paragraph  
23 refers to the same as the wood rot and decay that you saw in the  
framing members of the building, or the deterioration of the  
gypsum sheathing that's caused by the water intrusion?

24 A It looks like it would be both because the next sentence says:  
25 'For example, the gypsum sheathing and wood framing in the  
western portion.' So it would be both.

1 Q Okay. So in other words, the water damage that this  
2 paragraph refers to is really the same as the wood rot and the  
3 gypsum deterioration; is that right?

4 A That's correct, yeah.

5 Q Okay. We're not talking about anything – any other kind of  
6 damage, are we?

7 A I don't believe so.

8 Perrault Dep., at 56:2-57:1.

9 ACE retained Jeff Harris of CASE Forensics Corporation to assist it determining the  
10 extent, nature, and cause of damage at Windsong.<sup>6</sup> Mr. Harris performed several examinations  
11 of the Windsong building, reviewed photographs taken earlier by other investigators (primarily  
12 Mr. Perrault), reviewed maintenance records, and spoke with contractors who had examined  
13 and performed maintenance on the building, and prepared a report for ACE dated December  
14 26, 2007.<sup>7</sup> More recently, Mr. Harris reviewed the July 15, 2008 Declaration signed by Mr.  
15 Perrault, and the transcript of Mr. Perrault's deposition taken on August 28, 2008. He  
16 performed additional research in the scientific and engineering literature concerning wood  
17 deterioration in buildings and reviewed CASE Forensics' case histories of similar damage to  
18 other buildings. He prepared a supplemental report in which he concluded that although it is  
19 possible that some of the deterioration of wood framing and gypsum sheathing at Windsong  
20 might have taken place between 1989 and 1993, he found no evidence of such and found no  
21 scientific or engineering principles that would support Mr. Perrault's conclusion that any  
22 deterioration more probably than not occurred between those dates, which conclusion is based  
23 mostly on speculation.<sup>8</sup>

### 24 III. ISSUES PRESENTED

25 1. ACE's policies specifically exclude from coverage the perils of deterioration,

26 <sup>6</sup> Declaration of Jeff Harris (9/15/08), ¶3.

<sup>7</sup> *Id.*, ¶4.

<sup>8</sup> *Id.*, ¶¶5-6; Exhibit B, attached to Harris Decl.

wet or dry rot, and mold. “Water damage” is not excluded. May the Association obtain coverage for its water-caused deterioration, rot, or mold damage by renaming its loss “water damage”?

2. Where the Association has not established by evidence that any damage took place during the effective periods of the ACE policies, and where its claim involves no injury to a third-party's property, should the Court apply the third-party liability rule of joint and several liability and require that ACE pay for damage that took place long after its policies expired?

#### **IV. EVIDENCE RELIED UPON**

ACE relies upon the pleadings and papers filed in this lawsuit; the Declaration of Todd C. Hayes (8/7/2008) and attachments thereto; the Declaration of James R. Perrault (7/15/2008) and attachments thereto; the transcript of the Deposition of James R. Perrault (8/28/2008) and Exhibit 4 from that deposition; and the Declaration of Jeff Harris (9/15/2008) and attachments thereto.

## V. AUTHORITY

## A. Rules of Policy Interpretation.

The Association refers to several rules of insurance policy interpretation under Washington law.<sup>9</sup> Several additional rules of interpretation apply here. Washington law provides that the entire insurance policy must be construed together so as to give force and effect to each provision.<sup>10</sup> Courts may not rewrite a policy to provide for coverage when the plain language of the policy does not so provide.<sup>11</sup>

<sup>9</sup> Not all of the rules cited by the Association apply to this case. For example, none of the policy language relevant to this coverage dispute is ambiguous, nor does the Association argue ambiguity in its brief.

<sup>10</sup> *Boeing Co. v. Aetna Cas. & Surety Co.*, 112 Wn.2d 869, 784 P.2d 507 (1990); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 94 P.3d 358 (2004).

<sup>11</sup> *Britton v. Safeco Ins. Co.*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985); *Panorama Village Condo. Owners v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001).

Opposition to Motion for Partial Summary Judgment Re:  
Insurance Coverage for "Water Damage" - 6  
**C08-0162 JCC**

**B. The ACE Policies Do Not Cover Loss Caused by Deterioration, Wet or Dry Rot, or Mold.**

The Association's Motion is based on its argument that "water damage" caused by water intrusion is covered by ACE policies. The Association draws this argument out of the following exclusion in the policies:

If you have Comprehensive Protection, your protection does not include coverage for loss or damage caused by or resulting directly or indirectly from the following causes, or occurring in the following situations.

16. 'Wear and tear,' deterioration, rust, corrosion, marring or scratching, erosion, wet or dry rot, and mold. However, we will cover resulting loss or damage caused by: vehicles or aircraft, 'sprinkler leakage' water damage, freezing, collapse of a building or falling objects.<sup>12</sup>

This exclusion contains a resulting or ensuing loss provision, that preserves coverage for certain perils if they result or ensue from the perils excluded in the exclusion. *McDonald v. State Farm, supra*, 119 Wn.2d at 734. On its face, the ensuing loss provision in this exclusion does not apply to the Association's loss. No facts support the conclusion, and the Association has not argued, that water damage resulted from deterioration, wood decay, or mold. Rather, those excluded perils resulted from water intrusion at the condominium building.

More fundamentally, for coverage to be preserved for a peril listed in an ensuing loss provision, that peril must be separate and distinct from the perils excluded by the exclusion. Indeed, under the analysis of *Sunbreaker Condominium Assoc. v. Travelers Ins. Co.*, 79 Wn. App. 368, 901 P.2d 1079 (1995), relied upon by the Association, the reference to “water damage” in the exclusion’s ensuing loss provision must indicate an intent to regard “water damage” as something different from the perils listed as excluded, including deterioration, wet or dry rot, and mold. As pointed out by the Association, the *Sunbreaker* court regarded the separate reference to “weather conditions” in that case as an intent to treat weather conditions

<sup>12</sup> Todd Decl., Ex. C, at 88-89 of 139.

1 as a peril distinct from defective construction, repeated seepage, or rot. The Association  
2 claims that the ACE policies characterize "water damage" as a distinct and non-excluded  
3 peril.<sup>13</sup>

4 The problem with the Association's argument is that it ignores what happened at its  
5 building. By artful drafting of the Perrault Declaration, the Association's counsel described  
6 the damage at the building as "water damage" without once mentioning what it really was:  
7 water-caused deterioration, rot, or mold. Mr. Perrault signed the declaration because on its  
8 face it was technically accurate, water being a prerequisite for rot, mold, and the deterioration  
9 observed at the building. However, Mr. Perrault explained that the water damage he observed  
10 at Windsong Condominium consisted entirely of wood decay or rot, or water-caused  
11 deterioration of the gypsum sheathing. He testified to this:

12 Q Well, when you – when you described that condition of the  
13 sheathing as being water damaged, are you referring to anything  
14 different than deterioration of the sheathing that was caused by  
water?

15 A No. Same thing.<sup>14</sup>

16 Q Would you describe the condition of the wood that's shown  
17 in Photograph 12? I guess, Photograph 13 is another example of  
18 that. They both are described as severe decay or completely  
19 decayed away. Is that condition water damage?

20 A It's caused by water. Water is one of the factors that causes  
21 it. So I guess I'd characterize that as water damage.

22 Q In those two areas that we are looking at here in  
23 Photograph 12 and Photograph 13, if that is water damage,  
24 would you be referring to something different than wood decay?

25 A I would generally call that wood decay.<sup>15</sup>

26 Q So in other words, the water damage that this paragraph [6 of  
the Declaration] refers to is really the same as the wood rot and  
the gypsum deterioration; is that right?

---

<sup>13</sup> *Sunbreaker*, 79 Wn.App. at 377-78; Plaintiff's Motion, pp. 9-10.

<sup>14</sup> Perrault Dep., at 31:18-22.

<sup>15</sup> Perrault Dep., at 29:25-30:12.

1 A That's correct, yeah.

2 Q Okay. We're not talking about anything – any other kind of  
3 damage, are we?

4 A I don't believe so.<sup>16</sup>

5 Washington law does not permit an insured to evade the operation of a policy exclusion  
6 by renaming the peril that caused a loss. That tactic was rejected by the Washington Supreme  
7 Court in *Kish v. Ins. Co. of North America*, 125 Wn.2d 164, 883 P.2d 308 (1994). The  
8 insureds in that case suffered damage to their homes by flood waters from the Stillaguamish  
9 River. Heavy rainfall in the area and snow melt and rain in the mountains caused the river to  
10 rise and overflow into a sewage lagoon, which failed and inundated the insureds' homes. The  
11 homeowners' insurance policies excluded the peril of flood, but not rain. The insureds argued  
12 that the efficient proximate cause of their damage was rain, which was not excluded and was  
13 covered. The court rejected their argument because it found no difference between flood and  
14 rain-induced flood. "Rain" was "merely another characterization of flood in this case."<sup>17</sup> The  
15 court stated: "An insured may not avoid a contractual exclusion merely by affixing an  
16 additional label or separate characterization to the act or event causing the loss."<sup>18</sup> *See also,*  
17 *Eide v. State Farm Fire & Cas. Co.*, 79 Wn. App. 346, 901 P.2d 1090 (1995) (heavy rainfall  
18 and weakened soil were not distinct from excluded perils of earth movement and rising  
groundwater; no coverage for policyholders' damage from landslide caused by heavy rain).

19 This is exactly the argument presented by the Association in this Motion. The  
20 Association, faced with loss from severe wood decay and water-caused deterioration of  
21 gypsum sheathing, has re-characterized its loss as "water damage." By renaming its loss it can  
22 point to the ensuing loss provision of the wear-and-tear exclusion, which preserves coverage  
23 for "water damage." But none of this changes the fact that the only damage at the Windsong

25 <sup>16</sup> Perrault Dep., at 56:20-25.

26 <sup>17</sup> *Kish*, 125 Wn.2d at 171.

<sup>18</sup> *Kish*, 125 Wn.2d at 170, quoting *Chadwick v. Fire Ins. Exch.*, 17 Cal. App. 4<sup>th</sup> 1112, 1117, 21 Cal. Rpt. 2d 871 (1993).

1 Condominium was wood rot, deterioration of gypsum sheathing, and mold, all caused by water  
2 intrusion.<sup>19</sup> Manipulation of labels for the perils causing a loss in order to create coverage is  
3 not permitted under the law. The Association cannot create coverage by characterizing its loss  
4 as “water damage” where the only damage it suffered was rot, water-caused deterioration of  
5 sheathing, and mold, all excluded perils.

6 The Association apparently treats the ensuing loss provisions in both the wear-and-tear  
7 and the construction defect exclusions as provisions that grant coverage for water damage of  
8 any kind. This is incorrect. The Supreme Court explained why treating an ensuing loss clause  
9 as a grant of coverage was an improper interpretation:

10 Because the structure of an all-risk homeowners’ insurance  
11 policy consists of a grant of coverage counterbalanced by  
12 coverage exclusions, an interpretation of provisions contained in  
13 such a policy must acknowledge this structure, which is an  
14 important objective source of meaning and intent. Given the  
placement of the ensuing loss clause in a policy exclusion, it is  
difficult to reasonably interpret the ensuing loss clause contained  
in the defective construction and material exclusion to be a grant  
of coverage.<sup>20</sup>

15 The Court of Appeals put it succinctly: “Exclusion clauses do not grant coverage;  
16 rather, they subtract from it.”<sup>21</sup> The ensuing loss provision in the ACE policies preserves  
17 coverage for some types of water damage, but does not negate the exclusion for deterioration,  
18 rot, or mold.

19 The insured in *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 109 P.2d 1 (2004),  
20 attempted, unsuccessfully, to re-characterize the cause of excluded mold damage in order to  
21 create coverage where none existed. In that case, construction defects caused water leaks, both

22  
23 <sup>19</sup> Even though rot, deterioration, and mold might be described as “water damage” because they all depend on the  
introduction of water to certain materials, this means only that the “water damage” in the exclusion’s ensuing loss  
provision does not include the perils of rot, deterioration, or mold. Coverage would be preserved for any water  
damage not involving those perils. For example, if rot to framing members within a wall causes a water pipe to  
break, and the water leaks into the living area, staining the carpet and the insured’s couch, the water damage to the  
carpet and couch would remain covered, even though the loss was caused by rot, which is excluded.

24 <sup>20</sup> *McDonald*, 119 Wn.2d at 734.

25 <sup>21</sup> *Harrison Plumbing v. New Hampshire Ins. Co.*, 37 Wn. App. 621, 627, 681 P.2d 875 (1984).

26 OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:

INSURANCE COVERAGE FOR “WATER DAMAGE” - 10

C08-0162 JCC

1 to exterior walls and at a fountain located inside the insured's condominium unit. An engineer  
2 determined that the cause of water and mold damages were construction defects, which were  
3 excluded by the policy. The homeowner sought to avoid the exclusionary language by  
4 claiming that the mold damage was caused by water leaks, which were not excluded. The  
5 court rejected that effort because the leaks were part of the same uninterrupted causal chain  
6 that began with the defects and ended with the damage.<sup>22</sup>

7 In a case with facts remarkably similar those presented here by the Association's claim,  
8 the Supreme Court of Texas refused to disregard a homeowners policy exclusion for mold  
9 simply because the exclusion contained an ensuing loss provision that referred to "water  
10 damage." In *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006), the Fiess's  
11 homeowners' insurance policy contained an exclusion that stated "we do not cover loss caused  
12 by: wear-and-tear, deterioration, ... rust, rot, mold or other fungi." The same exclusion  
13 contained this ensuing loss provision:

14 We do cover ensuing loss caused by collapse of the building or  
15 any part of the building, water damage, or breakage of glass  
16 which is a part of the building if the loss would otherwise be  
17 covered under this policy.<sup>23</sup>

18 The Fiesses made a claim under their homeowners' policy for damage resulting from  
19 various water leaks in their house, including mold damage. Being dissatisfied with their  
20 insurer's payment, they sued, seeking coverage for all mold cleanup costs. The federal district  
21 court granted the insurer, State Farm Lloyds, summary judgment on the basis of the mold  
22 exclusion. On appeal, the Court of Appeals for the Fifth Circuit certified to the Texas Supreme  
23 Court the question of proper application of the exclusion's ensuing loss provision.

24 In *Fiess*, the Texas Supreme Court determined that the ensuing loss provision in that  
25 case did not restore or create coverage for mold simply because it referred to "water damage."  
26 The Feisses had argued that the ensuing loss portion of the exclusion ("We do cover ensuing

---

<sup>22</sup> *Wright v. Safeco*, 124 Wn.App. at 275.

<sup>23</sup> *Fiess*, 202 S.W.3d at 746.

1 loss caused by water damage") negated the exclusion for mold ("We do not cover loss caused  
2 by mold"). The Texas Supreme Court rejected that argument, referring to the insurance policy  
3 rule of interpretation that all parts of a policy must be read together, giving meaning to each  
4 sentence, clause and word to avoid rendering any portion inoperative. The same rule applies in  
5 Washington law.<sup>24</sup> The Texas court then explained that an "ensuing loss" is a loss that follows  
6 as a consequence of some preceding event or circumstance. Therefore, the policy's ensuing  
7 loss provision applied only to losses caused by an intervening cause that followed from an  
8 excluded peril listed in the exclusion.<sup>25</sup> Water damage did not result or ensue from the mold  
9 damage claimed by the Fiesses. Therefore, the ensuing loss provision did not apply.

10 The Texas court also addressed the meaning of "water damage" in the context of the  
11 Fiess's loss. In determining that "water damage" in this context could mean nothing other than  
12 mold damage, the Texas court quoted the "legendary" Judge Henry Friendly, sitting by  
13 designation with the Fifth Circuit:

14 We do not think that a single phenomenon that is clearly an  
15 excluded risk under the policy was meant to become  
16 compensable because in a philosophical sense it can also be  
17 classified as water damage; it would not be easy to find a case of  
18 rot or dampness of atmosphere not equally subject to that label  
19 and the exclusions would become practically meaningless. In  
our case the rot may have ensued from water but not from water  
damage, and the damage ensuing from the rot was not the  
damage from the direct intrusion of water conveyed by the  
phrase 'water damage.'<sup>26</sup>

20 The Texas court agreed with Judge Friendly, remarking that mold does not grow without  
water:

21  
22  
23  
24 <sup>24</sup> *Boeing Co. v. Aetna Cas. & Surety Co.*, 112 Wn.2d 869, 784 P.2d 507 (1990); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 94 P.3d 358 (2004).

25 <sup>25</sup> *Fiess*, 202 S.W.3d at 749, citing *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138 (Tex. Civ. App. 1975, writ refused).

26 <sup>26</sup> *Fiess*, 202 S.W.3d at 750, quoting *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939, 941 (5<sup>th</sup> Cir. 1965).

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:

INSURANCE COVERAGE FOR "WATER DAMAGE" - 12

C08-0162 JCC

LAW OFFICES OF  
**COZEN O'CONNOR**  
A PROFESSIONAL CORPORATION  
SUITE 5200  
WASHINGTON MUTUAL TOWER  
1201 THIRD AVENUE  
SEATTLE, WASHINGTON 98101-3071  
(206) 340-1000

1           If every leak and drip is ‘water damage,’ then it is hard to  
2           imagine any mold, rust, or rot excluded by this policy, and the  
27           mold exclusion would be practically meaningless.

3           The conclusion of the Texas court, that the ensuing loss provision for “water damage”  
4           does not trump the exclusion for mold damage, lines up exactly with Washington law.  
5           Washington law requires an interpretation of insurance contracts that provides meaning and  
6           effect to each and every part of the policy. Washington law holds that an ensuing or resulting  
7           loss provision, such as the one in the ACE policies, applies where an intervening cause  
8           following an excluded peril produces damage separate from that produced by the excluded  
9           peril, and coverage for such ensuing loss is preserved unless it, too, is excluded. Finally,  
10           Washington law does not permit the creation of coverage for excluded perils by simply  
11           renaming or re-characterizing the loss in a different fashion in an attempt to evade the  
12           exclusion.

13           Obviously, the Texas case is not controlling authority in Washington. But the  
14           reasoning in *Fiess* resonates with Washington law and conforms to the analysis in  
15           Washington’s *Wright v. Safeco* decision, which held that “water damage” was not different  
16           than “mold damage,” and that the insured’s mold damage in that case was not caused by water  
17           damage, but by water leaks that resulted from excluded construction defects.

18           The Windsong Association’s argument that it suffered “water damage” covered by the  
19           exclusion’s resulting loss provision must also fail. Placing a different label on the rot and  
20           deterioration damage found at the Windsong building in no way changes the nature of the  
21           damage or the fact that the ACE policies specifically exclude rot and deterioration. The rot  
22           and deterioration did not result in any further or different water damage, nor was the rot or  
23           deterioration caused by water damage. The damage was caused by water leaking through the  
24           building envelope because of construction defects and the building’s old age. Because the  
25           efficient proximate cause of all the damage was construction defects, which are excluded by

26           

---

<sup>27</sup> *Id.*

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER DAMAGE" - 13  
C08-0162 JCC

1 the ACE policies, and because the rot and deterioration damage that resulted from the defects  
2 are also excluded, the ACE policies provide no coverage for this claim.

3 **C. The Association Has Not Met Its Burden of Proof.**

4 In its Motion, the Association asserts that because the ACE policies are written on an  
5 “all risk” basis, “deciding coverage is essentially a one-step process” with the only issue being  
6 whether ACE can meet its burden to show that exclusions apply to defeat coverage.<sup>28</sup> This is  
7 incorrect. The existence of all-risk coverage does not justify the wholesale abandonment of  
8 long-established Washington law, which holds that analyzing coverage is a *two-step* process.  
9 First, the policyholder has the burden to show that its loss falls within the scope of the policy’s  
10 coverage. If that showing is made, the insurer has the burden to show that the loss is  
11 excluded.<sup>29</sup> This rule applies here as it does in all insurance matters. The fact is, the  
12 Association has not met its burden of establishing that its loss falls within the coverage of the  
13 ACE policies. At the very least, it has not established that any damage resulting from water  
14 intrusion took place between 1989 and 1993, when the ACE policies were effective.

15 In this Motion, the Association seeks the Court’s ruling that if some “water damage”  
16 occurred during ACE’s policy periods, then those policies must pay for all further water  
17 damage, even for damage that did not take place until years later. But this issue has no  
18 meaning unless the Association can establish that at least some damage did take place before  
19 ACE’s policies expired. The Association has not done this, and the issue of how much  
20 damage the ACE policies must cover is not properly before this Court. Therefore, the  
21 Association’s second issue in this Motion should be denied. (Additionally, if on the first issue  
22 the Court rules that the ACE policies do not cover “water damage,” then the Court should also  
23 deny the second issue, or at least decline to rule on it.)

24  
25 <sup>28</sup> Plaintiff’s Motion, p. 9, fn. 30.  
26 <sup>29</sup> *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 431-32, 38 P.3d 322 (2002); *American Star Ins. v. Grice*, 121 Wn.2d 869, 854 P.2d 622 (1993); *Wright v. Safeco Ins. Co. of Am.*, *supra*.

1      **D. There Is No Evidence That Actual Damage Took Place During the Effective**  
2      **Periods of the ACE Policies.**

3      The Association relies on the July 15, 2008 Declaration of James R. Perrault to  
4      establish the existence of damage prior to 1993. The Association has offered no other  
5      evidence, ever, to support that conclusion.

6      The Perrault Declaration states Mr. Perrault's opinion that some leak-induced water  
7      damage was "more-probably-than-not in existence between 1989 and 1993."<sup>30</sup> He based this  
8      opinion on the condition of the Windsong building when he saw it, the nature of the damaged  
9      building components (wood framing), and the "general rate of decay of such building  
10     components."<sup>31</sup> However, in his deposition, Mr. Perrault could not specify what this "general  
11     rate of decay" was. He made no engineering calculation to reach his opinion as to when the  
12     damage occurred.<sup>32</sup> He stated that the "general rate of decay" was actually highly variable and  
13     dependent on the particular construction and condition of each building or part of a building.  
14     He said that it takes many years for such severe decay to occur, 23 years for the Windsong  
15     building. He then stated that in other buildings the same severity of decay may take much  
16     longer, and in others it may occur faster.<sup>33</sup> Even at Windsong, the "rate of decay" varied from  
17     location to location at that building.<sup>34</sup> He also stated that the "rate of decay" depended on the  
18     type of wood material or species of wood used in construction.<sup>35</sup>

19     In fact, there is no "general" rate of decay. Wood decay is not necessarily a steady,  
20     linear progression. Jeff Harris of the engineering firm CASE Forensics assisted ACE in  
21     evaluating the damage at the Windsong Condominium. Mr. Harris has examined many  
22     buildings that have experienced water intrusion/rot conditions, and has studied the scientific

---

23     <sup>30</sup> Perrault Decl., p. 3.

24     <sup>31</sup> *Id.*

25     <sup>32</sup> Perrault Dep., 58:23-59:4. In his work for State Farm, Mr. Perrault did rely on calculations to determine the  
26     approximate time at which the rot damage reached the severity of substantial structural impairment. Harris Decl.,  
Ex. B, p.8 of 16.

<sup>33</sup> Perrault Dep., 63:1-64:10.

<sup>34</sup> Perrault Dep., 64:19-65:8.

<sup>35</sup> Perrault Dep., 65:15-18.

1 literature concerning the development of wood rot in buildings, including its rate of  
2 development. He has observed some buildings in which no rot condition was detected years  
3 after construction, where severe decay rapidly developed later on.<sup>36</sup> He states that the rate of  
4 wood decay in buildings is variable and cannot be generalized.<sup>37</sup> Based on his observations at  
5 the Windsong building, and his knowledge of the development of wood decay in such  
6 buildings and the factors that influence the speed at which decay develops, Mr. Harris believes  
7 that it is possible that some decay at Windsong may have taken place as early as 1993. But  
8 this is only a possibility; no evidence supports the actual existence of decay damage at that  
9 time. No one observed or even suspected the existence of damage before the last ACE policy  
10 expired. Any conclusion regarding such early damage would necessarily involve speculation,  
11 according to Mr. Harris.<sup>38</sup>

12 The Court should disregard the opinion expressed in the Perrault Declaration  
13 concerning the existence of actual damage during the ACE policy terms. The opinion is based  
14 on an unproven and unreliable assumption—the linear rate of decay progression—and is  
15 speculative. At the very least, there remains a question of fact as to the existence of actual  
16 damage in the 1989-1993 time period. This alone precludes the Court's ruling on the  
17 Association's second issue. The extent of ACE's coverage obligation is presently not at issue  
18 and need not be determined unless the Association first establishes that actual damage took  
19 place when ACE's coverage was in force. The Association has not done this.

20 **E. The ACE Policies Do Not Cover all Damage Developing over Decades of Exposure**  
21 **to Water, even if some Damage Took Place between 1989 and 1993.**

22 The Association has not met its burden of showing that it suffered actual damage when  
23 ACE's policies were effective. The Court should not rule on the question of whether ACE  
24 would be obligated to pay for all subsequent damage.

25 <sup>36</sup> For example, Harris Decl., Ex. B, p.11.  
26 <sup>37</sup> *Id.*, Ex. B, pp.14-16.  
27 <sup>38</sup> *Id.*, ¶6, Ex. B, pp.14-16.

1       Even assuming that some damage took place during ACE's coverage period, the  
2 Association's conclusion that all following damage must be covered by the ACE policies is  
3 wrong. The only legal authority cited by the Association to support its theory is *American*  
4 *National Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250 (1988), a  
5 case that followed *Gruol Constr. Co. v. Ins. Co. of N. Am.*, 11 Wn. App. 632, 524 P.2d 427  
6 (1974), in holding that all liability policies in effect during the time that a third-party  
7 claimant's property sustains progressive or continuous damage are jointly and severally liable  
8 for all of the damage that develops, including damage that might have occurred outside of the  
9 policy term of a particular policy. While attempting to apply this rule to its property insurance  
10 claim, the Association overlooks the major distinction between third-party liability insurance  
11 and first-party property insurance. These different coverages have different purposes and the  
12 same rules do not always apply to both.

13       Third-party liability insurance provides protection for the policyholder for its liability  
14 to someone else. In contrast, first-party property insurance provides protection for losses to the  
15 policyholder's own property.<sup>39</sup> This important difference determines the extent of the insurer's  
16 liability under each type of insurance coverage.

17       A third-party liability policy insures the policyholder's liability to someone else.  
18 Although the trigger of coverage for such a policy depends on the occurrence of some property  
19 damage or injury during the policy period, it is not the property damage itself that is insured;  
20 the policy insures the insured's *liability*. The insured's liability for any property damage  
21 depends on more than the existence of the damage. Other factors determine the insured's legal  
22 liability, such as the plaintiff's comparative negligence, the insured's possible legal immunity,  
23 and other defenses, such as waiver or the statute of limitations. Because the insurer's liability  
24 under the policy is not necessarily tied to the specific policy period—the insured's liability for  
25

26       

---

<sup>39</sup> *Hillhaven Prop. Ltd. v. Sellen Constr. Co.*, 133 Wn.2d 751, 759, 948 P.2d 796 (1997); *State Farm Fire & Cas. Co. v. English Cove Assoc.*, 121 Wn. App. 358, 368, 88 P.3d 986 (2004).

1 harm may be determined by conduct or events that took place after the policy expired, even if  
2 the property damage took place before expiration—Washington courts have based the trigger  
3 of coverage on actual damage during the policy period, but have allowed insureds to recover  
4 under the liability coverage all damage that flowed from the insured's liability.<sup>40</sup>

5 First-party insurance coverage is different. It protects the insured against physical loss  
6 to its own property. No one else is involved and the extent of the insurer's obligation is based  
7 entirely on the property damage and the policy provisions alone, not the insured's conduct or  
8 its defenses. Coverage is purchased for a certain time. The insured pays no premium for  
9 property insurance coverage that extends indefinitely beyond expiration of the policy that is  
10 purchased.<sup>41</sup>

11 For these reasons, no Washington court has applied the *Gruol Construction/B&L*  
12 *Trucking* rule of joint and several liability for progressive, continuous property damage in the  
13 first-party property insurance context. This Court should not be the first to do so. The Court  
14 should deny the Association's Motion in its entirety.

## 15 VI. CONCLUSION

16 The Association knows that deterioration, wet and dry rot, and mold are all excluded by  
17 the ACE policies. Attempting to create coverage for this excluded damage, the Association re-  
18 characterizes its loss as "water damage," clinging to the resulting loss provision of the wear-  
19 and-tear exclusion. But the rot and deterioration observed at the Windsong building did not  
20 result in any separate "water damage." The renaming of a loss to avoid the effect of a policy  
21 exclusion has been rejected over and over by Washington courts. This Court should now deny  
22 the Association's Partial Summary Judgment Motion concerning insurance coverage for  
23 "water damage," and rule that the ACE policies do not cover deterioration, wet or dry rot, or

24  
25 <sup>40</sup> *Gruol Constr. Co., supra*.

26 <sup>41</sup> *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 88, 794 P.2d 1259 (1990) ("Although the public is served by  
maximizing the extent of protection afforded by [UIM] coverage, the insurance company is not required to  
provide the coverage for free.").

1 mold, even if such damage is regarded as "resulting loss or damage." The Court should also  
2 reject the Association's request for a ruling on the extent of ACE's hypothetical liability for all  
3 property damage, as the Association has not established that any damage took place when  
4 ACE's policies were effective.

5 ACE requests oral argument for this Motion. A proposed order is filed with this  
6 opposition brief.

7 Dated: September 15, 2008

COZEN O'CONNOR

8  
9 By: s/ Craig H. Bennion  
10 Craig H. Bennion, WSBA No. 11646  
11 Washington Mutual Tower  
12 1201 Third Avenue, Suite 5200  
13 Seattle, Washington 98101  
14 Telephone: 206.340.1000  
15 Toll Free Phone: 800.423.1950  
16 Facsimile: 206.621.8783  
17 Attorneys for Defendants  
18 Bankers Standard Insurance Company and  
19 ACE Fire Underwriters Insurance Company

20 SEATTLE\757807\1 187388.000

21  
22  
23  
24  
25  
26  
OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER DAMAGE" - 19  
**C08-0162 JCC**

LAW OFFICES OF  
**COZEN O'CONNOR**  
A PROFESSIONAL CORPORATION  
SUITE 5200  
WASHINGTON MUTUAL TOWER  
1201 THIRD AVENUE  
SEATTLE, WASHINGTON 98101-3071  
(206) 340-1000

1

2 **CERTIFICATE OF SERVICE**

3

4 I hereby certify that on September 15, 2008, I electronically filed the following  
5 documents:

6 ACE'S OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
7 INSURANCE COVERAGE FOR "WATER DAMAGE"

8 DECLARATION OF JEFF HARRIS

9 [PROPOSED] ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT  
10 RE: INSURANCE COVERAGE FOR "WATER DAMAGE"

11 with the Clerk of the Court using the CM/ECF system which will send notification of such  
12 filing to the following:

13 Gregory L. Harper, WSBA No. 27311 - [greg@harperhayes.com](mailto:greg@harperhayes.com)  
14 Todd C. Hayes, WSBA No. 26361 - [todd@harperhayes.com](mailto:todd@harperhayes.com)  
15 Michael J. Crisera, WSBA No. 30353 - [mcrisera@harperhayes.com](mailto:mcrisera@harperhayes.com)

16 **HARPER | HAYES PLLC**  
17 One Union Square  
18 600 University Street, Suite 2420  
19 Seattle, WA 98101

20 Counsel for Plaintiff

21 DATED this 15th day of September, 2008.

22 COZEN O'CONNOR

23 By: *s/ Craig H. Bennion*  
24 Craig H. Bennion, WSBA No. 11646

25 Washington Mutual Tower  
26 1201 Third Avenue, Suite 5200  
Seattle, Washington 98101  
Telephone: 206.340.1000  
Toll Free Phone: 800.423.1950  
Facsimile: 206.621.8783  
Attorneys for Defendants  
Bankers Standard Insurance Company and  
ACE Fire Underwriters Insurance Company

SEATTLE758683\1 187388.000

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT RE:  
INSURANCE COVERAGE FOR "WATER DAMAGE" - 20  
C08-0162 JCC

LAW OFFICES OF  
**COZEN O'CONNOR**  
A PROFESSIONAL CORPORATION  
SUITE 5200  
WASHINGTON MUTUAL TOWER  
1201 THIRD AVENUE  
SEATTLE, WASHINGTON 98101-3071  
(206) 340-1000